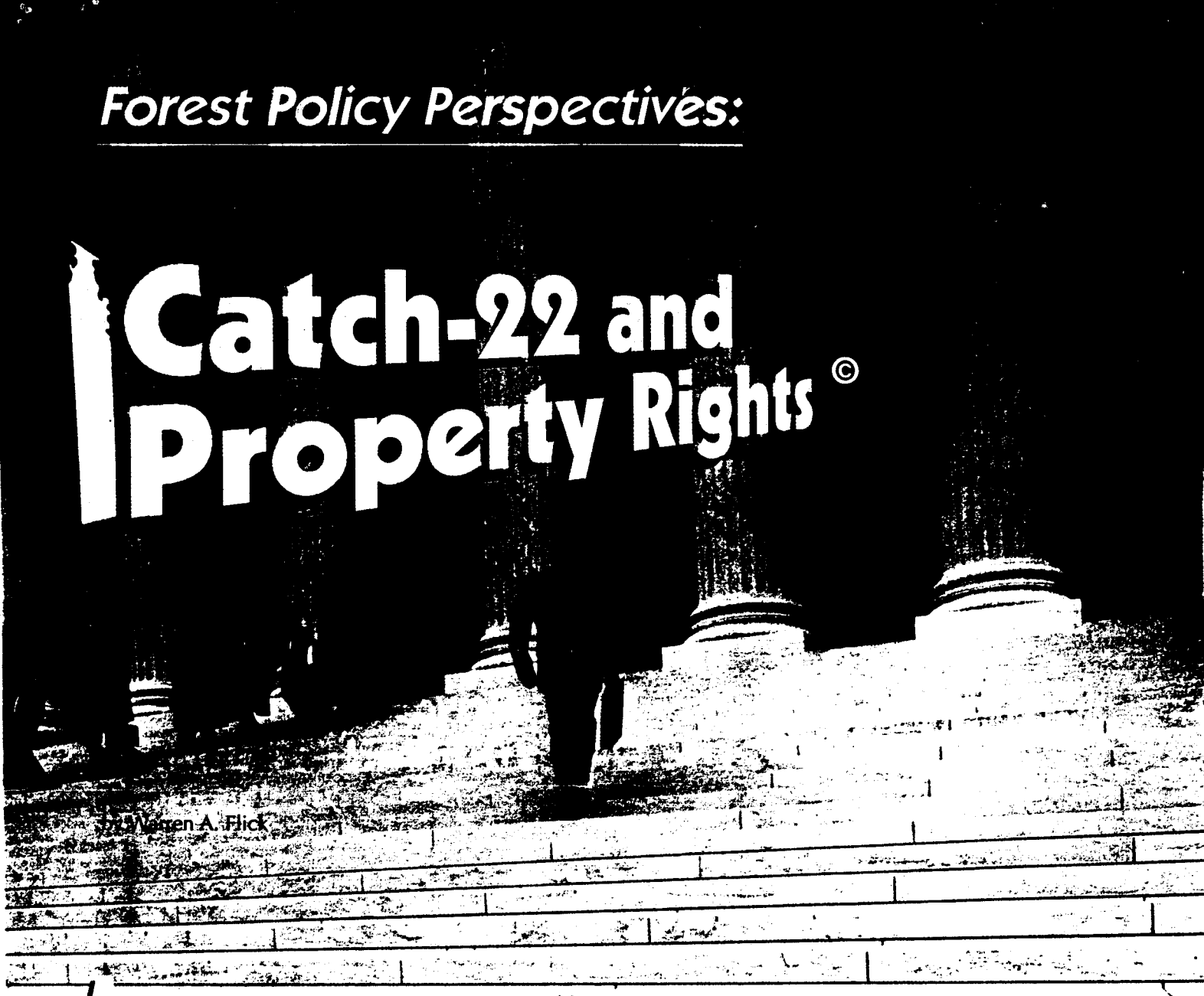
Catch-22 and Property Rights ©



By Warren A. Flick

Almost everyone knows Catch-22 situations where the inherent logic of something creates an absurdity or self-contradiction. Author Joseph Heller's original was a military rule designed to thwart airmen from pleading insanity to escape bombing missions — the rule said any airman rational enough to want to be grounded could not possibly be insane and therefore had to fly.

Such is the situation with property rights. Since 1987, several Supreme Court decisions have strengthened the substantive rights of property owners, making it a little more difficult for local, state, and federal agencies to impose senseless regulations. One case provides that land owners may seek monetary compensation when regulations go too far.

Another emphasizes how regulation may eliminate value, and others require that land-use regulations be reasonable, both in their logic and their impact on land owners. These cases outline a complex body of constitutional law that helps protect land owners from overbearing regulation.

Yet lurking in the background was a collection of Catch-22 rules that prevent enforcement of those rights. The problematic rules are "procedural" or "jurisdictional" in nature. Collectively they raise the cost of litigating property rights claims to prohibitive levels and thereby prevent land owners from ever having their takings claims heard on the

merits. The result: land owners have rights but can't get them enforced in federal courts, the most logical courts for enforcement of federal constitutional rights.

Doctrines of Catch-22

The Catch-22 rules involve doctrines of abstention, ripeness, and something known as the "Tucker Act Shuffle."

Abstention is designed to limit the intrusiveness of federal courts in state affairs. State and federal governments both have concurrent and independent legal power. Federal law is generally supreme. If federal courts willingly heard lawsuits against state agencies or courts, state sovereignty would mean very little. So federal courts often abstain from hearing cases that they may otherwise have the power to hear but that pose the prospect of unduly interfering with state legal activities.

If a land owner were being regulated under state law, perhaps were already involved in state enforcement proceedings, maybe involving complex state regulatory schemes concerning the environment or land use, federal courts would very likely abstain from hearing the case even though the plaintiff claimed his Fifth Amendment property rights were at stake.

Ripeness, the second relevant doctrine, helps determine the proper time to hear a case. Perhaps a landowner's land-use application is still pending, or perhaps state law provides for compensation through state court proceedings. To sustain a lawsuit in federal court, the Supreme Court has held that takings plaintiffs must show there has been a "final decision" about their property rendered by an appropriate public authority, and that the plaintiff has sought compensation through procedures, if any, provided by state law. Only then will his claim be ripe for Fifth Amendment adjudication in a federal court.

These principles have proven difficult for lower courts to apply in a consistent manner, and land owners lack clear guidance about what constitutes a final decision. State and local regulatory agencies have been able to exploit this law by engaging land owners in an unending series of applications, each being returned with requests for modifications or with demands for new conditions. If an agency never flatly denies a land-use permit, the situation may never be ripe for adjudication.

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And if a final decision is reached, land owners may be forced to litigate first in state court for compensation, including successive appeals through a state appellate system, before being allowed in federal court. It is very costly.

Who has jurisdiction?

Sometimes land owners are regulated directly by federal agencies, maybe under the Endangered Species Act or Clean Water Act. If they believe the regulation amounts to a taking, they must sue in federal court. But which one? Federal district courts have general jurisdiction for a variety of cases. The U.S. Court of Federal Claims has specialized jurisdiction, provided in part by the Tucker Act, for money claims against the U.S.

For compensation, land owners should sue in Claims Court; for injunctions or declaratory judgments against application of federal law, land owners should sue in a district court. The Claims Court lacks the ability to enjoin agency regulation and the district courts lack the ability to award just compensation. Further, the Claims Court lacks jurisdiction over any case that is also pending in a district court.

Here land owners meet the "Tucker Act Shuffle." When a land owner sues in federal district court, the government lawyers argue the case is really about compensation and should be in the Claims Court. When a land owner sues for compensation in the Claims Court, government lawyers argue the case is really about enjoining federal law or regulation and should be in a district court. If a land owner sues simultaneously in both courts, the Claims Court must dismiss the case.

It is a procedural nightmare. The Constitution says property may not be taken without just compensation; but existing procedure says you can get compensation only by submitting to years of applications, agency appeals, and litigation, costing hundreds of thousands of dollars and 8, 9, 10 or more years of legal activity all with a very uncertain outcome.

Forest land owners especially are crippled because the values of timber and timberland seldom justify half-million dollar lawsuits extending over a decade. Land owners and others are forced to submit to the regulation. Sometimes they go quietly into the night and leave the property to nature; sometimes

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they submit to unreasonable conditions on using the property in order to salvage some income.

Tucker Act Shuffle dehumanizes

Congress has been working on laws that would straighten things out, but it hasn't yet succeeded. The House passed one bill in 1997 (H.R. 1534), and another in 1998 (H.R. 992), and similar legislation was considered this year in the Senate (S. 2271). These bills limit the use of abstention, clear up the definition of ripeness, and define federal court jurisdiction to wipe out the Tucker Act Shuffle.

Senators supporting environmental groups and government agencies threatened filibuster, and the Senate majority in favor of the bill was not large enough to block debate. The bill effectively died in the Senate on July 13, 1998. Also, President Clinton threatened to veto it.

Persons seeking enforcement of federal environmental law can go straight into federal court. All the major environmental statutes have citizen suit provisions that help expedite such suits. Persons seeking federal enforcement of others of the Bill of Rights, to secure free speech or religion, or to protect privacy, can go easily to federal court. But property owners can not.

Most Catch-22 situations dehumanize people. They take away presumptions of reasonableness, responsibility, dignity and integrity. When courts function properly, they shape and polish the law, limiting it here, extending it there, giving it the balance and completeness that is fitting of real human circumstances. Given the breadth and newness of environmental law as well as its impact on important property interests, courts are needed. Although they work smoothly to enforce environmental quality or other civil rights, they are stymied for those seeking property rights. The Constitution says land owners have substantial rights, but court procedures prevent enforcement. Such is the Catch-22 of modern law. ■

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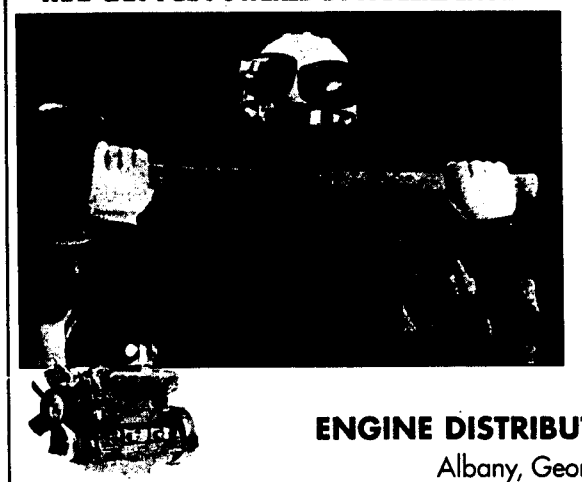

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